



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu/

AUDITS

IN THE MATTER OF THE PETITION OF NRG)	ORDER GRANTING PETITIONER'S
THERMAL, LLC FOR A DECLARATORY)	PETITION FOR A DECLARATORY
RULING PURSUANT TO N.J.S.A. 52:14B-8)	RULING
AND N.J.S.A. 2A:16-50 et seq.)	
)	BPU DOCKET NO. EO09080667

(SERVICE LIST ATTACHED)

BY THE BOARD:

Background/ Procedural History

On August 19, 2009, NRG Thermal LLC ("Petitioner" or "NRG"), an affiliate of the electric generation company NRG Energy, Inc., filed a verified petition ("Petition") with the New Jersey Board of Public Utilities ("Board") seeking expedited treatment for a declaratory ruling under N.J.S.A. 52:14B-8.

The Petitioner proposes to build and operate a combined heat and power ("CHP") facility on the site of the Princeton HealthCare System's University Medical Center of Princeton at Plainsboro ("Medical Center"). The CHP facility will provide electricity, steam, and chilled water to the Medical Center. According to the Petitioner, the CHP facility will be capable of generating 4.6 megawatts ("MW") of electricity, 3,000 tons of chilled water per hour, and 48,000 pounds of steam per hour. The Petitioner also proposes to operate backup diesel generator units located on site. A separate NRG entity plans to construct a 0.2 MW solar array that will also be located on site.

In its petition, the Petitioner states that under current federal law and regulations, the CHP facility must be classified as either (i) a Qualifying Facility ("QF") under the Public Utility Regulatory Purposes Act of 1978, or (ii) an Exempt Wholesale Generator ("EWG") under the Energy Policy Act of 2005. A QF has advantages arising from the ability to require a local electric utility to purchase its output. Because the Petitioner intends to sell its output to the Medical Center, it is not seeking QF status, and will instead seek to be classified as an EWG.

The Petitioner states that an EWG may only sell electricity at wholesale. Accordingly, the Petitioner states that it proposes to create an affiliated company (the "Interposed Entity"), to purchase the CHP facility's output and resell it to the Medical Center at retail, thereby generating a wholesale transaction. The Petitioner states that the Interposed Entity will sell

electricity from the CHP facility to the Medical Center, and that the Medical Center will be the sole retail customer of the Interposed Entity. According to the Petition, surplus power generated by the CHP facility, above and beyond the Medical Center's needs, will be sold in the PJM wholesale markets. The Medical Center will purchase supplemental power as needed, or when it is economic to do so, from a third party supplier, or from Public Service Electric and Gas Company ("PSE&G") via Basic Generation Service. The Petitioner has further stated that no thermal energy generated by the CHP facility will be sold to residential customers.

In connection with this proposal, the Petitioner has requested that the Board issue a declaratory ruling that:

- The Interposed Entity shall not, in the circumstances presented, be deemed to be either an Electric Power Supplier, Marketer, or public utility of the State of New Jersey;
- The Interposed Entity shall not be subject to any of the rules and requirements applicable to Electric Power Suppliers, Marketers, and public utilities under New Jersey law; and
- The Medical Center shall be entitled to avail itself of all financial and other benefits that are accorded by New Jersey law to the host of an on-site generation facility.

In a letter submitted to the Board Secretary supplementing its Petition, NRG clarified, among other things, its reference to "all financial and other benefits" in its request. Specifically, Petitioner stated that the financial benefits in question for the Medical Center are exemptions from payment in connection with the purchase of electricity generated by the CHP facility, of (i) the Societal Benefits Charge, (ii) the market transition charge or its equivalent, and (iii) sales and use tax.

On September 15, 2009, the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") submitted comments in connection with Petitioner's request for a declaratory ruling. Rate Counsel is generally in favor of promoting the development of CHP. Rate Counsel stated that, while it believes the Board could assert jurisdiction over the Interposed Entity, it does not object to the Board declining to assert jurisdiction under the specific circumstances in this case. Rate Counsel requests that the Board require the Petitioner and the Interposed Entity to notify Rate Counsel and the Board of any proposed changes, with no changes being made without prior approval. Rate Counsel also requests that the Board state that its determination in this proceeding has no precedential value in any subsequent proceeding before the Board.

Discussion

The Petitioner has requested that the Board issue a declaratory ruling finding that the Interposed Entity would not be an Electric Power Supplier. Under the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. ("EDECA"), an Electric Power Supplier is defined as:

[A] person or entity that is duly licensed pursuant to the provisions of this act to offer and to assume the contractual and legal responsibility to provide electric generation service to retail customers, and includes load serving entities, marketers and brokers that offer or provide electric generation service to retail customers. . . . [N.J.S.A. 48:3-51]

Under this definition, an entity must provide Electric Generation Service in order to be considered an Electric Power Supplier. Under EDECA, the definition of Electric Generation Service excludes energy and capacity generated on the same site as the location where consumption of the energy is metered. N.J.S.A. 48:3-51.

As described by the Petitioner, the Interposed Entity will provide only energy generated on the same site as the Medical Center. Specifically, the Petitioner represents that the CHP facility will be located on the Medical Center site; that the Medical Center will be the sole retail customer served by the Interposed Entity; and that the Medical Center will obtain any additional electric energy it needs, above and beyond what the CHP facility provides, from a marketer or Electric Power Supplier, or from PSE&G's Basic Generation Service.¹ Accordingly, the Interposed Entity would be providing only energy generated on the Medical Center site. The Interposed Entity, as described by the Petitioner, therefore, would not be providing Electric Generation Service, and thus would not be an Electric Power Supplier.

EDECA defines a Marketer as a "duly licensed electric power supplier" that may provide transmission and other services in addition to electric generation service. Thus, since the Interposed Entity, as previously described, is not an Electric Power Supplier, then the Interposed Entity also cannot be considered a Marketer.

The Petitioner also requested that the Board issue a declaratory ruling that the Interposed Entity would not be a public utility. With respect to electric energy, EDECA states that an On-Site Generation Facility shall not be considered a public utility. N.J.S.A. 48:3-51. EDECA defines On-Site Generation Facility to include not only the generation facility, but also services appurtenant to electric sales by the facility to the end-use customer located on the same site as the generation facility. N.J.S.A. 48:3-51. By purchasing the CHP facility's electric energy and re-selling it to the Medical Center, the Interposed Entity would be providing services appurtenant to the sale of the CHP facility's electric energy and the purchase of that energy by the Medical Center. Accordingly, the Interposed Entity would be included within the definition of On-Site Generation Facility, and would not be considered a public utility.

The Board notes that it has previously found that an entity serving as an intermediary purchasing energy from a CHP facility and re-selling it to an end-use customer on the same site was not a public utility. In re Jersey Central Power and Light Company, 170 P.U.R. 4th 66, 1996 WL 306070 (1996), provided that the Interposed Entity made no sales of electricity to third party end-use customers.

With respect to thermal energy, the Petitioner has stated that it contemplates selling thermal energy only to the Medical Center, and that, in any event, it will not sell thermal energy to non-residential customers. N.J.S.A. 48:2-13(e) provides that the Board shall not have the authority to regulate the sale of thermal energy to non-residential customers. Accordingly, the sale of

¹ The Petitioner does note that the Interposed Entity may serve as the Medical Center's agent in administering the relationship between the Medical Center and any third party supplier or PSE&G for Basic Generation Service for the purchase of any additional electricity. Under EDECA, an Energy Agent is a person licensed by the Board to arrange the retail sale of electricity between government or private aggregators and electric power suppliers. N.J.A.C. 14:4-1.2. Thus, since the Petitioner has provided no indication that the Interposed Entity's arrangement for the Medical Center's purchase of additional electricity would involve a government or private aggregator, the Interposed Entity's performance of this work for the Medical Center would not cause the Interposed Entity to be considered an Energy Agent.

thermal energy by the Interposed Entity, in the circumstances described by the Petitioner, would not be subject to the Board's authority to regulate public utilities.

The Petitioner further requests that the Board determine that the Interposed Entity is not subject to any of the rules and requirements applicable to Electric Power Suppliers, Marketers, or public utilities under New Jersey law. To the extent that the Board has determined that, under the limited facts presented by Petitioner, the Interposed Entity would not be an Electric Power Supplier, Marketer, or Public Utility, the Interposed Entity is not subject to the requirements established by the Board or by Title 48 that otherwise apply to such entities.

Lastly, the Petitioner has requested that the Board issue a declaratory ruling that the Medical Center would be exempt from payment of the: (i) the societal benefits charge, (ii) the market transition charge or its equivalent, and (iii) sales and use tax.

N.J.S.A. 48:3-77(b) provides that none of the following charges will be imposed on sales of electricity to an "on-site customer of an on-site generating facility":

- The societal benefits charge or its equivalent;
- The market transition charge or its equivalent;
- The transition bond charge or its equivalent.

N.J.S.A. 48:3-77(a) provides that the sale of power that is consumed by someone other than the on-site customer is subject to all of these charges.

EDECA does not define the term "on-site customer of an on-site generating facility," and does not specify that an end-use customer purchasing electricity generated by an on-site generator becomes ineligible for the exemptions listed above by purchasing the electricity through an intermediary rather than directly from the generating facility. The statute shows no intent to characterize a customer who is on the same site as the generating facility, but who purchases the facility's power through an intermediary, as something other than an on-site customer. Additionally, the Medical Center's purchase of energy from the Interposed Entity is solely for energy generated by the CHP facility. Therefore, notwithstanding the inclusion of the Interposed Entity as an intermediary between the Medical Center and the CHP facility, the Board has determined that the Medical Center will be an "on-site customer of an on-site generating facility." Thus, the Medical Center is eligible for the exemption from the charges listed above for its purchases of electricity generated by the CHP facility.

The Board notes, however, that under N.J.S.A. 48:3-77(c), the exemptions for on-site customers no longer applies if on-site generation facilities, installed after the starting date of retail competition under EDECA, in the aggregate reduce customer purchases from an electric public utility by a specified amount. Conceivably, the exemption could therefore end in the future. Therefore, the Board notes that the Medical Center's exemption is limited by the provisions of N.J.S.A. 48:3-77(c).

The Board, in its discretion, may render a declaratory ruling which binds the agency and all parties to the proceedings on the facts alleged, but only after the interested parties have been afforded full opportunity for hearing. All of the parties to this proceeding have had an opportunity to be heard through the submission of written comments, and the Board FINDS that it has sufficient information to proceed.

Therefore, based upon the above, the Board HEREBY FINDS that, under the facts presented, the Interposed Entity will not be an Electric Power Supplier, Marketer, or Public Utility. Thus, the Board FINDS that, to the extent that the Interposed Entity as described in the Petition is not an Electric Power Supplier, Marketer, or Public Utility, it is not subject to the rules and requirements of such entities.

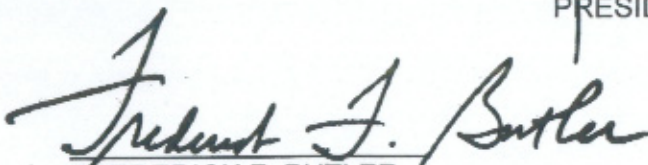
Additionally, the Board HEREBY FINDS that the Medical Center, in its purchases of electricity generated by the CHP facility, can avail itself of the exemptions under N.J.S.A. 48:3-77, except as provided in N.J.S.A. 48:3-77(c).

The Board notes that a declaratory order binds the Board and all parties to the proceedings on the state of facts alleged. Accordingly, this Order does not apply to other facts, or to other parties. To this end, the Board ORDERS that the Petitioner and the Interposed Entity promptly notify the Board and Rate Counsel of any proposed changes in the circumstances presented by the Petitioner, with the understanding that the declaratory ruling may not apply to the changed circumstances.

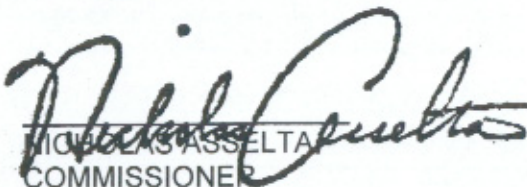
DATED: 9/29/09

BOARD OF PUBLIC UTILITIES
BY:


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PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER

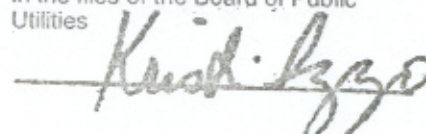

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ATTEST: 
KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



SERVICE LIST

I/M/O THE PETITION OF NRG THERMAL, LLC FOR A DECLARATORY RULING
PURSUANT TO N.J.S.A. 52:14b-8 AND N.J.S.A. 2A:16-50 et. seq.
DOCKET NO. EO09080667

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